

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 56277-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
HUSSEIN HASSAN KADIR,)	
)	
Appellant.)	FILED: July 31, 2006

PER CURIAM. A fistfight involving a metal bar resulted in Hussein Kadir being charged with, and convicted of, second degree assault with a deadly weapon. Kadir appeals, arguing that he was denied his right to a unanimous jury. He also argues that the prosecutor committed misconduct and that his conviction is not supported by sufficient evidence. Because only one act supported the charged offense, and because the verdict could only have rested on an alternative means that was supported by the evidence, we conclude Kadir's right to a unanimous jury was preserved. We also conclude that the prosecutor did not commit misconduct and that the conviction is supported by sufficient evidence. Accordingly, we affirm.

The facts are not disputed and will be repeated here only when necessary to explain our decision.

DECISION

I.

Kadir contends he was denied his right to a unanimous jury in two respects.¹ First, he contends the court should have given a unanimity instruction because several distinct acts supported the charge of second degree assault with a deadly weapon and the State did not elect the act on which it was proceeding. We disagree.

Where several acts could constitute the crime charged and those acts are not part of a continuing course of conduct, the jury must be unanimous as to which act constituted the crime.² To ensure jury unanimity, the State must elect the act it will rely on for conviction or the court must give a unanimity instruction.³ Kadir contends the jury could have convicted him based on two distinct acts: swinging at the victim as a metal bar fell out of his sleeve, and throwing the metal bar at the victim “well after” Clarissa Silvestre broke up the fight. The State responds that the instruction was unnecessary because the evidence did not show several acts that could support conviction, and even if it did, those acts

¹ Criminal defendants have a right to a unanimous jury. State v. Kinchen, 92 Wn. App. 442, 451, 963 P.2d 928 (1998) (quoting State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994)).

² State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995); State v. Noltie, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991).

³ Fiallo-Lopez, 78 Wn. App. at 724.

were part of a continuing course of conduct. The State is correct.

Silvestre testified that as she broke up the fight, Kadir swung at the victim's face and missed. At that moment, a metal bar appeared to fall out of Kadir's sleeve and made a clanking sound as it landed on the ground. Silvestre and Kadir reached for the bar. Silvestre grabbed it and then followed close behind Kadir as he followed the victim across the street. According to Silvestre, Kadir "struck at" the victim several more times before the fight ended. The victim testified that when Silvestre intervened, he turned away and began walking across the street. Something flew by his face and he heard the sound of metal hitting the ground.

While Silvestre's and the victim's testimony differed in some respects, no reasonable juror could have concluded from their testimony that there were two separate assaults with a metal object. Silvestre testified that she picked up the metal bar when it hit the ground. Neither Silvestre nor the victim testified to hearing or seeing more than one metal bar or more than one assault with a single bar. Nor was there any argument below that Kadir possessed two bars or assaulted the victim twice with the same bar.⁴ Thus, the only reasonable

⁴ The record does not support Kadir's contention that the prosecutor "argued in closing the metal tool flew by [the victim's] face and that the act was second degree assault" or that he argued "the defendant's having the metal in his sleeve when he started a fight . . . constituted second degree assault." Appellant's Brief at 7.

interpretation of the evidence was that there was one assault with a single metal bar, and that Silvestre and the victim remembered that incident differently. Absent multiple acts that could each support conviction, no unanimity instruction or election was required.

And even if there had been multiple acts, a unanimity instruction was still not required because the acts were part of a continuing course of conduct. By all accounts, the fight involved one assailant and one victim and occurred over a short period of time in a single location. Except for Silvestre's brief intervention, the fight was continuous. Viewed in a commonsense manner, these facts demonstrate a continuing course of conduct rather than several distinct acts.⁵

Second, Kadir contends he was denied his right to a unanimous jury because the instructions presented alternative means of committing assault, but only one means was supported by substantial evidence and the record does not demonstrate that the verdict was based on that means. Again, we disagree.

"If one of the alternative means upon which a charge is based fails and there is only a general verdict, the verdict cannot stand unless the reviewing court can determine that the verdict was founded upon one of the methods with regard to which substantial evidence was introduced."⁶ In determining whether a verdict was based on a particular alternative means, the court considers the

⁵ State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

⁶ State v. Bland, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993) (emphasis in original).

charging document and the trial record, including the parties' arguments.⁷ Here, the court instructed the jury on two forms of assault—actual battery and attempted battery. The State concedes that the actual battery means was not supported by substantial evidence. But it argues, and we agree, that the verdict could only have rested on the attempted battery means.

Although the information did not charge a particular means, there was no evidence that Kadir ever struck the victim with the metal bar. More importantly, the prosecutor made it clear in closing argument that only the attempted battery form of assault was before the jury:

I want . . . to show you one other instruction, No. 7. It's the definition of assault. And I want you to pay particular attention to the last paragraph. An assault is also an act with unlawful force done with intent to inflict bodily injury upon another, tending but failing to accomplish it, and accompanied with the apparent present ability to inflict the bodily injury, if not prevent it. It is not necessary that bodily injury be inflicted.

[The victim] told you that he for all intents and purposes . . . wasn't hurt in that fight. But under the law in Washington state, you don't get a pass [i]f you try to hurt someone and you have a deadly weapon, and by fortune, you miss. . . . He had this weapon, a deadly weapon in his hand. He intended to use it against [the victim], and he missed. But he is guilty of assault in the second degree and we ask that you find him guilty.⁸

Given the absence of any evidence of a battery with the weapon, the prosecutor's concession that a battery did not occur, and the prosecutor's argument directing the jury to decide the case under the definition of attempted battery, we are confident that the jury's verdict rested on the attempted battery

⁷ State v. Rivas, 97 Wn. App. 349, 353, 984 P.2d 432 (1999).

⁸ Report of Proceedings (RP) at 374-75 (emphasis added).

means. Since, as discussed below, that means was supported by substantial evidence, Kadir was not denied his right to a unanimous jury and is not entitled to a new trial.⁹

II.

Kadir next contends the prosecutor committed misconduct requiring a new trial. He claims the prosecutor misstated the law in closing argument by confusing the definition of a deadly weapon under the second degree assault statute with the definition of a deadly weapon for purposes of the deadly weapon enhancement. The record belies this claim. Although the prosecutor did not read both definitions of “deadly weapon” to the jury, he did not argue that the jury could use the enhancement definition for anything other than its intended purpose. There was no misstatement of the law.

Kadir also argues that the prosecutor erroneously told the jury they could convict him of second degree assault if he merely possessed a deadly weapon during the fight. The record belies this claim as well. The prosecutor expressly premised his arguments on Kadir’s use of the deadly weapon, not his mere possession of it.

Finally, Kadir contends the prosecutor improperly asked him to comment on the credibility of a witness during the following exchange:

[PROSECUTOR]: So no one else jumped into the fight?

[KADIR]: No.

[PROSECUTOR]: And it was just you and Durell?

⁹ See Rivas, 97 Wn. App. at 351-52.

[KADIR]: Yeah.

[PROSECUTOR]: So the testimony then of your teammate, is it Mr. Kallama?

[KADIR]: Kamara, I think so, yes.

[PROSECUTOR]: Kamara. I'm sorry. Mr. Kamara. So he may have been wrong?

[KADIR]: He might get it right, because me, I was busy fighting. So maybe. Your know, all the spectators went to school with those people.

[PROSECUTOR]: Oh, I see.

[KADIR]: So maybe he could have seen who.¹⁰

The prosecutor did not ask Kadir to comment on a witness' credibility; rather, he only asked whether Kadir thought the witness was mistaken. Questions "about whether another witness was mistaken or had 'got it wrong'" do not constitute misconduct and are objectionable only on relevance grounds.¹¹ Kadir did not object to the questions below and has not argued relevance on appeal.¹²

III.

Kadir's final argument is that his conviction is not supported by sufficient evidence. To convict Kadir of second degree assault under the instructions given in this case, the State had to prove that he assaulted the victim with a weapon "which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury."¹³ Kadir contends "[t]he State presented no evidence of

¹⁰ RP at 298 (emphasis added).

¹¹ State v. Wright, 76 Wn. App. 811, 822, 888 P.2d 1214, review denied, 127 Wn.2d 1010, 902 P.2d 163 (1995).

¹² See Wright, 76 Wn. App. at 821-22 (while questions about whether another witness was mistaken were objectionable, defendant could not challenge them on appeal because counsel did not object at the time).

¹³ Clerk's Papers at 25.

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the type of harm

the tool [he] allegedly carried . . . might cause[.]” He further contends that “[p]articipating in a fight with a lug wrench up his sleeve would not cause any more harm to [the victim] than would a fistfight alone.”¹⁴ The record supports Kadir’s conviction.

The weapon, which was admitted at trial, was variously described as a wrench, metal bar, or crowbar with “a hook on the end of it.”¹⁵ Kadir admitted to police that he tried to hit the victim with that weapon. The victim testified that a metal object flew by his head. Similarly, Silvestre testified that Kadir swung at the victim’s head just before the metal bar hit the ground. Viewed in a light most favorable to the State,¹⁶ this evidence was sufficient to support Kadir’s conviction.

Affirmed.

FOR THE COURT:

Becker, J.

Seaton, J.

¹⁴ Appellant’s Brief at 30.

¹⁵ RP at 160.

¹⁶ Evidence is sufficient if, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences most favorably to the State. Salinas, 119 Wn.2d at 201.

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Schindler, A.S.